SHAKESPEARE'S LEGAL MAXIMS.

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SHAKESPEARE'S LEGAL MAXIMS.

BY

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* * * * Juvat integros accedere fontes
Atque haurire. LUCRETIUS.

* * * * "It is pleasant to handle
An untouched subject."

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NOTICE.

A PORTION of this attempt to explain several obscure passages in the works of William Shakespeare, has been published amongst the transactions of "The Berlin Society for the Study of Modern Languages," in the "Archiv," edited by Ludwig Herrig.

SHAKESPEARE'S LEGAL MAXIMS.

"Qui genus humanum ingenio superavit, et omneis
Restinxit, stellas exortus uti aerius sol."
LUCRETIUS, iii. 1056.

THE lawyer, when he reads attentively the works of William Shakespeare, may not be more surprised by the poet's correct use of law terms, and intimate acquaintance with legal customs and tenures and the *lex scripta*, than by his extensive and profound knowledge of the maxims of the English law.

PORTIA. "To offend, and judge, are distinct offices,
And of opposed natures."
Merchant of Venice, Act 3, *Scene* 1.

QUEEN KATHERINE. "I do believe,
Induced by potent circumstances, that
You are mine enemy; and make my challenge,
You shall not be my judge: for it is you
Have blown this coal betwixt my lord and me,
Which God's dew quench!—Therefore, I say again,
I utterly abhor, yea, from my soul,
Refuse you for my judge; whom, yet once more,
I hold my most malicious foe, and think not
At all a friend to truth."
Henry VIII., Act 2, *Scene* 4.

Nemo debet esse judex in propriâ suâ causâ. (12 Rep. 113.) No man ought to be a judge in his own cause. It is a fundamental rule in the administration of justice that a man cannot be judge in a cause in which he is interested (per Cur. 2 Stra. 1173): *nemo sibi esse judex vel suis jus dicere debet.* (C. 3. 5. 1.) If a man will prescribe that if any cattle were upon the demesnes of the manor, there doing damage, that the lord of the manor for the time being hath used to distrain them, and the distress to retain till fine were made to him for the damages at his will, this prescription is void; because *it is against reason that if wrong be done any man, that he thereof should be his own judge;* for by such way, if he had damages but to the value of an halfpenny, he might assess and have therefore one hundred pounds, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not, be allowed before judges: *quia malus usus abolendus est:* an evil or invalid custom ought to be abolished. (Litt. s. 212.) It is also a maxim of the law of England, that *Aliquis non debet esse judex in propriâ causâ, quia non potest esse judex et pars.* (Co. Litt. 141 *a.*)

OLIVIA. "This practice hath most shrewdly pass'd upon thee;
But, when we know the grounds and authors of it,
Thou shalt be both the plaintiff and the judge
Of thine own cause."

Twelfth Night, Act 5, *Scene* 1.

Portia and Queen Katherine both seem to refer to this maxim; and Olivia promises, when the persons are discovered who have made Malvolio

> "The most notorious geck and gull
> That e'er invention play'd on,"

that she will then allow him to be both plaintiff and judge of his own cause, notwithstanding that *nemo debet esse judex in propriâ suâ causâ.*

SHYLOCK. "My deeds upon my head! I crave the law,
The penalty and forfeit of my bond."
PORTIA. "Is he not able to discharge the money?"
BASSANIO. "Yes, here I tender it for him in the court;
Yea, twice the sum: if that will not suffice,
I will be bound to pay it ten times o'er,
On forfeit of my hands, my head, my heart:
If this will not suffice, it must appear
That malice bears down truth. And I beseech you,
Wrest once the law to your authority:
To do a great right, do a little wrong;
And curb this cruel devil of his will."
PORTIA. "It must not be; there is no power in Venice
Can alter a decree established:
'Twill be recorded for a precedent;
And many an error, by the same example,
Will rush into the state: it cannot be."
Merchant of Venice, Act 4, *Scene* 1.

Portia may expound the law of Venice; but in the English law it is also an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation. An English judge is sworn to determine, not according to his own private judg-

ment (see per Lord Camden, 19 Howell's State Trials, 1071; per Williams, L., 4 Cl. & Fin. 729), but according to the known laws and customs of the land; not appointed to pronounce a new law, but to maintain and expound the old, *jus dicere et non jus dare:* (1 Bla. Com. per Lord Kenyon, C. J., 5 T. R. 682, 6 Id. 605, and 8 Id. 239; per Grose, J., 13 East, 321; per Lord Hardwick, C., Ellis *v.* Smith, 1 Ves. jun., 16 T. R. 696, 1 B. & B. 563.) *Stare decisis et non quieta movere* — to stand by things as decided, and not to disturb those things which are tranquil, for *omnis innovatio plus novitate perturbat quam utilitate prodest* (2 Bulstr. 338), — every innovation occasions more harm and derangement of order by its novelty, than benefit by its abstract utility. The ancient judges of the law have ever (as appeareth in our books) suppressed innovations and novelties in the beginning, as soon as they have offered to creep up, lest the quiet of the Common Law might be disturbed, and so have acts of parliament done the like. (Co. Litt. 379 b.) The judges say in one book, "we will not change the law which always hath been used;" and another saith, "it is better that it be turned to a default, than the law should be changed, or any innovation made." (Co. Litt. 282 b.) The rule *stare decisis* does, however, admit of exceptions, where the former determination is most evidently contrary to reason, or to the divine law.

CRANMER. "Ah, my good lord of Winchester, I thank you;
You are always my good friend: if your will pass,
I shall both find your lordship judge and juror."
Henry VIII. Act 5, *Scene* 2.

Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores. (8 Rep. 308.) It is the office of the judge to instruct the jury in points of law — of the jury to decide on matters of fact. It is the office of the judges to instruct the grand assize or jury in points of law; for as the grand assize or other jurors are triers of the matters of fact, *ad quæstionem facti non respondent judices*, so, *ad quæstionem juris non respondent juratores.* It is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury be kept distinct, that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. (Rex *v.* Poole, Cas. temp. Hardw. 28.)

ELIZABETH. "What now, my son? have I not ever said,
How that ambitious Constance would not cease,
Till she had kindled France and all the world
Upon the right and party of her son?
This might have been prevented and made whole,
With very easy arguments of love!
Which now the manage of two kingdoms must
With fearful bloody issue arbitrate."
KING JOHN. "Our strong possession, and our right for us."

ELIZABETH. "Your strong possession, much more than your right;
Or else it must go wrong with you, and me:
So much my conscience whispers in your ear;
Which none but heaven, and you, and I, shall hear.

Act 1, *Scene* 1.

In æquali jure melior est conditio possidentis. (Plowd. 296.) Where the right is equal, the claim of the party in possession shall prevail. The lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *desseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. (2 Bla. Com. 195; 1 Inst. 345.) Or it may happen that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In such cases the wrong-doer has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies. But until some act be done by the rightful owner to divest this possession and assert his

title, such actual possession is *prima facie* evidence of a legal title in the possessor; and it may by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. (2 Bla. Com. 196.) King John seems to refer to this maxim when he says,

"Our strong possession, and our right for us,"

but Elizabeth says,

"Your strong possession, much more than your right,"

because John was not *in æquali jure* with Arthur, but he was a wrong-doer, having merely a naked possession; for after the death of King Richard I. John occupied the throne in defiance of the right of his nephew Arthur, who was the son of John's elder brother Geoffry.

HAMLET. "Farewell, dear mother."
KING. "Thy loving father, Hamlet."
HAMLET. "My mother: father and mother is man and wife; Man and wife is one flesh; and so, my mother."
Act 4, *Scene* 3.

Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus. (Bracton, lib. 5, Tract. 5, cap. 25.) Man and wife are as one person, because they are one flesh and one blood. A man may not grant nor give his tenements to his wife, during the coverture, for that his wife and he be but one person in

law. (Litt. s. 168.) If a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and the wife, viz. the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath by force of the jointure the one moiety in law, and the other the other moiety, &c. (Litt. s. 221): for the husband and wife are accounted to be but one person in law, *duæ animæ in carne una.* (Lex divina, and see 6 Rep. 4.)

FALSTAFF. "Of what quality was your love, then?"

FORD. "Like a fair house, built upon another man's ground; so that I have lost my edifice, by mistaking the place where I erected it."—*Merry Wives of Windsor, Act 2, Scene 2.*

MRS. QUICKLY. "Alas the day! good heart that was not her fault; she does so take on with the men; they mistook their erection."

FALSTAFF. "So did I mine, to build upon a foolish woman's promise."—*Merry Wives of Windsor, Act 3, Scene 5.*

Quicquid plantatur solo solo cedit. (Wentw. Off. Ex. 14th ed. 145.) Whatever is affixed to the soil belongs to the soil. It is a general and a very ancient rule of law that whatever is affixed to the soil becomes, in contemplation of law, a part of the soil, and is consequently subject to the same rights of property as the soil itself. (Woodfall's Landlord and Tenant,

5th ed. 447.) The ancient Common Law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered everything attached to the land as part of the land. (4 Rep. 64 a; 7 Lord Raymond, 738; Mackintosh *v.* Trotter, 3 Mee. & Wel. 184, 186; Williams on Executors, pt. 2, bk. 2, ch. 3, s. 2.) Hence it follows that houses themselves, which consist of an aggregate of chattels personal, (namely, timber, bricks, &c.), fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present time. (Williams, P. P. 3rd ed. p. 13.) So if a man eject another from land, and afterwards build upon it, the building belongs to the owner of the ground on which it is built, according to the principle *Ædificatum solo solo cedit.* But where a man, supposing that he has a good title to an estate, builds upon the land with the knowledge of the real owner, who suffers the erections to be made, without giving any notice of his claim, the Court of Chancery will compel him, in a suit brought for recovery of the land, to make due allowance and compensation for such improvements. (Broom, Max.) Ford evidently refers to this maxim, and Falstaff probably intends this much to be understood, that he committed as great a mistake, by building upon a foolish woman's promise, as they make who build upon another man's ground.

ANGELO. "The law hath not been dead, though it hath slept."

Measure for Measure, Act 2, Scene 3.

Dormiunt aliquando leges, moriuntur nunquam. (2 Inst. 161.) The laws sometimes sleep, but they never die. Although it was a maxim of the Civil Law that as laws might be established by custom, they could likewise become obsolete by desuetude, or be abrogated by contrary usage, *ea vero quæ ipsa sibi quæque civitas constituit sæpe mutari solent vel tacito consensu populi vel aliâ posteâ lege latâ* (I. 1. 2. 11.; Irving, Civil Law, 4th ed., 123): and by the law of Scotland a statute is said to lose its force by desuetude (Stair, Macdoual, Wallace), if it has not been in execution for sixty years, and according to some Scotch lawyers for a hundred years; and a distinction is made between statutes which are as it were half obsolete and those in *viridi observantiâ*, yet by the law of England every statute continues in force until it is repealed by a subsequent Act of Parliament. *Lex Angliæ sine parliamento mutari non potest* (2 Inst. 619), for nothing is so agreeable to natural equity as that everything should be dissolved by the same means which made it binding. *Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est.* (2 Inst. 360.) The statutes can only be altered or repealed by the same authority by which they were made—*jura eodem modo destituuntur quo con-*

stituuntur (Dwarr. Stats. 672), and, *eodem ligamine quo ligatum est dissolvitur.* (Co. Litt. 212 b.)

WOLSEY. "That seal
You ask with such a violence, the king,
(Mine, and your master,) with *his own hand gave me:*
Bade me enjoy it, with the place and honours,
During my life; and, to confirm his goodness,
Tied it by letters patent: now, who'll take it?"
SURREY. "The king, that gave it."
WOLSEY. "It must be himself then."
Henry VIII. Act 3, *Scene* 2.

The Lord Chancellor (*à cancellando*, from his power to cancel Letters Patent, being the highest point of his jurisdiction) or Lord Keeper, is the chief judge in the extraordinary Court of Equity, as well as in the ordinary Court of Common Law. (4 Inst. 79, 82, 88; Wood's Inst. 2nd ed. pp. 459, 460.) He is not made by Letters Patent, but by the delivery of the Great or Broad Seal to him, and by taking an oath to serve the king and his people faithfully in the office of Lord Chancellor. (4 Inst. 87.) He is made Lord Chancellor of England, or Lord Keeper of the Great Seal, *per traditionem magni sigilli sibi per dominum regem*, and by taking his oath, *forma cancellarium constituendi regnante Henrico secundo fuit appendendo magnum Angliæ sigillum ad collum cancellarii electi.* (Camden, p. 131.) Thus the delivery of the King's Seal, or the taking it away (alluded to by Shakes-

peare in this passage), is the ceremony used in creating or unmaking a chancellor. Some have gotten it by Letters Patent, at will, (35 H. VI. 3. b. of Winch., 1 Hen. VI. nu. 16.) and one for term of his life (Cardinal Wolsey); but it was holden void, because an ancient office must be granted as it hath been accustomed. (4 Inst. 87.)

ANTIPHOLUS E. "What, will you murder me? Thou, gaoler, thou,
I am thy prisoner: wilt thou suffer them
To make a rescue?"
OFFICER. "Masters, let him go;
He is my prisoner, and you shall not have him."
PINCH. "Go, bind this man, for he is frantick too."
ADRIANA. "What wilt thou do, thou peevish officer?
Hast thou delight to see a wretched man
Do outrage and displeasure to himself?"
OFFICER. "He is my prisoner: if I let him go,
The debt he owes, will be required of me."

If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process (that is, during the pendency of a suit), to escape, he is liable to an action on the case. (Cro. Eliz. 625.) But if after judgment a gaoler or a sheriff permit a debtor to escape, who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by an action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand; which doctrine is grounded on the equity of the Statute of Westminster 2nd, 13 Edw. I. c. 11, and 1 Rich. II. c. 12.

(Bro. Abr. t. parliament. 192; Inst. 382; 3 Bla. Com. 165.) *Ubi jus ibi remedium.* (1 T. R. 512.) There is no wrong without a remedy. *Jus,* in the sense in which it is used in this maxim, signifies "the legal authority to do or to demand something." (Mackfield, Civ. Law. 6.) *Remedium* may be defined to be the right of action, or the means given by law for the recovery of a right, and, according to this maxim, whenever the law gives anything, it gives a remedy for the same: *lex semper dabit remedium.* (Jacob, Law Dic., title "Remedy;' Bac. Abr., Actions in general; Broom, Max.) Every injury to a legal right necessarily imports a damage in the nature of it, though there be no pecuniary loss. (Per Holt, C. J., Ashby *v.* White, 2 Lord Raymond.) Thus where a prisoner is in execution on final process, the creditor has a right to the body of his debtor every hour till the debt is paid; and an escape of the debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies. (Williams *v.* Mostyn, 4 M. & W. 153; Wylie *v.* Birch, 4 Qu. B. 566, 557; Clifton *v.* Hooper, 6 Qu. B. 468.)

YORK. "I took an oath, that he should quietly reign."
EDWARD. "But, for a kingdom, any oath may be broken:
I'd break a thousand oaths, to reign one year."
RICHARD. "No; God forbid, your grace should be forsworn."
YORK. "I shall be, if I claim by open war."
RICHARD. "I'll prove the contrary, if you'll hear me speak."
YORK. "Thou canst not, son; it is impossible."
RICHARD. "An oath is of no moment, being not took

> Before a true and lawful magistrate,
> That hath authority over him that swears:
> Harry had none, but did usurp the place;
> Then, seeing 'twas he that made you to depose,
> Your oath, my lord, is vain and frivolous."
> *III. Henry VI., Act* 1, *Scene* 2.

An oath is an affirmation or denial of anything *before one that hath authority to administer the same*, calling God to witness that his testimony is true. (3 Inst. 165. c. 74.) *Sacramentum, habet in se tres comites, veritatem, justitiam et judicium: veritas habenda est in jurato; justitia et judicium in judice.* (Bracton, l. 4, f. 186.) Four sorts of oaths have been enumerated, viz., *Juramentum promissionis*, where an oath is taken to do, or not to do such a thing; (it appears that York had taken an oath of this description): *Juramentum purgationis*, which is where a person is charged with any matter by Bill in Equity: *Juramentum probationis*, where one is produced as a witness to prove or disprove a thing; and *Juramentum triationis*, where one is sworn to try the issue, such as a juror. The oath must be lawful, allowed by the Common Law, or some Act of Parliament: so Salisbury says—

> "It is great sin, to swear unto a sin;
> But greater sin, to keep a sinful oath.
> Who can be bound by any solemn vow
> To do a murderous deed, to rob a man,
> To force a spotless virgin's chastity,
> To reave the orphan of his patrimony,

To wring the widow from her customed right;
And have no other reason for this wrong,
But that he was bound by a solemn oath ?"
II. Henry VI., Act 5, *Scene* 1.

And it must be taken before one that hath authority; not before a person acting in a private capacity, or pretending to have authority where he hath none; nor by one that goes beyond the authority which was granted. For such false oaths cannot amount to perjury in law, because they are of no validity, being *coram non judice.* (3 Inst. 165; 4 Inst. 278, 279; 2 Roll. Abr. 257; Wood's Inst., 2nd ed., pp. 411, 412.)

BEAUFORT. "The commons hast thou rack'd; the clergy's bags
Are lank and lean with thy extortions."
SOMERSET. "Thy sumptuous buildings, and thy wife's attire,
Have cost a mass of public treasury."
BUCKINGHAM. "Thy cruelty in execution
Upon offenders, hath exceeded law,
And left thee to the mercy of the law."
II. Henry VI., Act 1, *Scene* 3.

Executio est executio juris secundum judicium. (3 Inst. 212.) It is a maxim of the law of England, that the execution must be according to the judgment, *et quæ in curia nostra rite acta sunt, debit' executioni demandari debent:* and for express authority, *non licet felonem pro felonia decollare.* In case of high treason, beheading is part of the judgment, and therefore the King may pardon all the rest saving beheading, as is usually done in case of nobility.

But if a man being attainted of felony be beheaded, it is no execution of the judgment, because the judgment is, that he be hanged until he be dead: in this case the judgment doth belong to the judge, and he cannot alter it; the execution belongs to the sheriff, &c., and he cannot alter it. And if the execution might be altered in this case from hanging to beheading, by the same reason it might be altered to burning, stoning to death, &c. (3 Inst. 211.) It is worthy of notice that Shakespeare seems to have been well aware of the distinct offices of judge and executioner, for he makes Guiderius, in speaking of Cloten, say,

> "Why should we be tender,
> To let an arrogant piece of flesh threat us;
> Play judge and executioner, all himself?"
>
> *Cymbeline, Act 4, Scene 2.*

If an officer beheads one who is adjudged to be hanged, or *vice versâ*, it is murder: (1 Hale, P. C. 494; 1 Hawk. P. C. c. 28, ss. 11, 12, 17, 18), for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff substitutes one kind of death for another, he then acts by his own authority, which does not extend to the commission of homicide. (4 Bla. Com. 179.) If the sheriff, or other proper officer, alters the execution or any other doth execute the offender, or if he is slain without authority of law, it is felony, and the law implies malice. (Wood's

Inst., 2nd ed., p. 662.) So Clarence says to the murderers hired by Gloster,

> "Are you call'd forth from out a world of men
> To slay the innocent? What is my offence?
> Where is the evidence that doth accuse me?
> What lawful quest have given their verdict up
> Unto the frowning judge? or who pronounced
> The bitter sentence of poor Clarence' death?
> Before I be convict by course of law,
> To threaten me with death is most unlawful."
>
> *Richard III., Act* 1, *Scene* 4.

To conclude this point: *Judicium est legibus, non exemplis*, (4 Rep. 33), and *Judicium est juris dictum* and *executio est executio juris secundum judicium.* (3 Inst. 211.) Buckingham may also refer to Gloster's cruelty in making the law an instrument of oppression or extortion and the liability thereby incurred, for *Executio juris non habet injuriam.* (2 Inst. 481; 1 Inst. 289 a.) The law in its executive capacity will not work a wrong. If an individual, under colour of the law, does an illegal act, or if he abuses the process of the court to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability will be incurred.

> CLAUDIO. "Fellow, why dost thou show me thus to the world?
> Bear me to prison, where I am committed."
> PROVOST. "I do it not in evil disposition,
> But from lord Angelo, by special charge."
>
> *Measure for Measure, Act* 1, *Scene* 3.

Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse quia parere necesse est. (10 Rep. 70, 76.) Where a man does anything by command of a judge, the law will not consider that he acted from any wrongful motive, because it was necessary for him to comply with the orders of the judge. In 26 Ed. III. 7. 70. it is taken for a maxim, that the thing which an officer doth by warrant or command of a court, cannot be said to be against the peace: and Doct. and Stud. 150, the king's officers are bound to execute the king's writs at their peril. (10 Rep. 70.) When a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the precept or process of the court. But when the court has no jurisdiction of the cause, then the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process, for it is not necessary to obey him who is not a judge of the cause, no more than it is to obey a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti.* (10 Rep. 76.)

LADY MACBETH. "What need we fear who knows it, when none can call our power to account?"—*Macbeth, Act* 5, *Scene* 1.

LEAR. "No, they cannot touch me for coining;
I am the king himself!"

Lear, Act 4, *Scene* 6.

GONERIL. "Say, if I do; the laws are mine, not thine;
Who shall arraign me for 't?"

Lear, Act 5, *Scene* 3.

Lady Macbeth, Lear and Goneril seem to refer to the ancient and fundamental principle of the English constitution, that the king can do no wrong. *Rex non potest peccare.* (2 Roll. R. 304; Jenk. Cent., 9, 308.)

DUKE. "He dies for Claudio's death."
ISABELLA. "Most bounteous sir, [*Kneeling.*]
Look, if it please you, on this man condemn'd,
As if my brother liv'd: I partly think
A due sincerity govern'd his deeds
Till he did look on me; since it is so,
Let him not die: my brother had but justice,
In that he did the thing for which he died:
For Angelo,
His act did not o'ertake his bad intent,
And must be buried but as an intent
That perish'd by the way: thoughts are no subjects;
Intents but merely thoughts."

Measure for Measure, Act 5, *Scene* 1.

An evil intention is not punishable equally with the fact; *Crimen non contrahitur nisi nocendi voluntas intercedit:* (Bracton, lib. cap. 4; Wood's Inst., 2nd ed., p. 340), except in treason, when the maxim *voluntas reputatur pro facto* (3 Inst. 5, 69), the will is taken for the deed, is said to apply to its full extent. It is a rule laid down by Lord Mansfield, said to comprise all the principles of previous decisions in similar cases (per Lawrence, J., Rex *v.* Higgins, 2 East, 21),

that so long as an act rests in bare intention, it is not punishable by the law of England,—so Ulpian says, *Cogitationes pœnam nemo patitur* (D. 48, 19, 18), and Montesquieu, *Les lois ne se chargent de punir que les actions exterieurs*,—but when an act is done, the law judges not only of the act itself, but of the intent with which it was done.

ANGELO. "What's open made to justice,
That justice seizes."
Measure for Measure, Act 2, *Scene* 1.

And if the act be accompanied with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable. (Rex *v.* Scofield, 2 East, P. C. 1028.) *Non officit conatus, nisi sequitur effectus* (6 Rep. 42; Wood's Inst., 2d ed., p. 340): for it is a principle of natural justice and of our law that the intent and the act must both concur to constitute the crime. (Lord Kenyon, 7 T. R. 514.) But where one has the use of his reason, and is at liberty, his endeavour to commit a felony, as to rob, &c., is punishable, though not to that degree as if the felony and robbery, &c., had been actually committed. For in such cases *voluntas non reputabitur pro facto*, the will shall not be taken for the deed. (3 Inst. 69; 11 Rep. 98.)

HAMLET. "Give me your pardon, sir: I have done you wrong;
But pardon it, as you are a gentleman.
This presence knows, and you must needs have heard,

> How I am punish'd with a sore distraction.
> What I have done,
> That might your nature, honour, and exception,
> Roughly awake, I here proclaim was madness.
> Was 't Hamlet wrong'd Laertes? Never, Hamlet:
> If Hamlet from himself be ta'en away,
> And, when he's not himself, does wrong Laertes,
> Then Hamlet does it not; Hamlet denies it."

In all crimes there must be an evil disposition; a mere mistake is not punishable; and those that are to be esteemed guilty of any offences must have the use of their reason, and be at their own disposal or liberty (Wood's Inst., 2d ed., p. 340, 339): for *Actus non facit reum nisi mens sit rea* (3 Inst. 107),—the act does not make a man guilty unless his intention were guilty. Moreover Hamlet says,

> "Who does it then? His madness: if 't be so,
> Hamlet is of the faction that is wrong'd;
> His madness is poor Hamlet's enemy."

And in criminal cases, idiots and lunatics are not chargeable for their own acts, if committed at a time when they are *non compos mentis*, for it is a maxim of the law of England that *furiosus solo furore puniatur*,—a madman is only punished by his madness. (Co. Litt. 247 b; Bla. Com. 24, 25.) So Hamlet says he is of the faction that is wrong'd: and he seems to refer, not only to the maxim that the act does not make a man guilty unless his intention were guilty, but afterwards, in the same passage, to the kind of homicide to which it is applicable:

"Sir, in this audience,
Let my disclaiming from a purposed evil,
Free me so far in your most generous thoughts,
That I have shot my arrow o'er the house
And hurt my brother."

Hamlet, Act 5, *Scene* 2.

viz., homicide *per infortunium*, or by misadventure*, which is where a man, doing a lawful act, without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a bystander. So Bracton says, *De amputatore arborum, qui cum ramum projiceret, inscius occidit transeuntem: aut cum quis pilam percusserit, &c. ex cujus ictu occisus est, tales de homicidio non tenentur* (lib. 3. fo. 136 b.). If a man shooting at butts or a target, by accident kill a bystander, it is misadventure (1 Hale, 472, 475, 380); but this must be understood of cases where a proper precaution to prevent accidents has been taken, for if the target be placed near a highway or path, where persons are in the habit of passing, the killing would probably be deemed manslaughter.

CAMILLO. "Have you thought on
A place, whereto you'll go?"

FLORIZEL. "Not any yet:
But as *the unthought-on accident is guilty*

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* Homicide (from the Latin *homicidium; homo*, a man, and *cædo*, to strike, or kill) signifies the killing of a human creature, and it is of three kinds, *justifiable, excusable*, and *felonious*.

To what we wildly do; so we profess
Ourselves to be the slaves of chance, and flies
Of every wind that blows."
Winter's Tale, Act 4, *Scene* 3.

If the act be unlawful, it is murder. As if A. meaning to steal a deer in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder; for that the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him. Thus if B., the owner of the park, had shot his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony. So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium:* for it was not unlawful to shoot at the wild fowl; but if he had shot at a cock or a hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful. If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to fear them or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slain. (Marlbr. ca. 25.; 3 Inst. 56, 57.) All crimes have their conception in a corrupt intent, and have their

consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature. (Lord Bacon's Max. reg. 15.) As if A. having malice to B. strikes at him, and misseth him and kills C., this is murder in A. (9 Rep. 81; H. P. C. 50.) So Bracton says, *Si quis unum percusserit, cum alium percutere vellet, in felonia tenetur* (lib. 3, fol. 155.) And if one lays poison to kill B., and C. takes it and dies in consequence, this is murder in him that laid the poison: for, *In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.* (Bacon, Max. 65.) The malice intended to one makes the accidental death of another to be murder. (Wood's Inst., 2nd ed., 353.)

HUBERT. "Stand back, Lord Salisbury; stand back, I say;
By heaven I think my sword's as sharp as yours.
I would not have you, Lord, forget yourself,
Nor tempt the danger of my true defence,
Lest I, by marking of your rage, forget
Your work, your greatness, and nobility."

BIGOT. "Out, dunghill! darest thou brave a nobleman?"

HUBERT. "Not for my life; but yet I dare defend
My innocent life against an Emperor."

King John, Act 4, Scene 2.

Excusable homicide is *se defendendo*, or where one has no other possible means of preserving his own life than by killing the person who reduces him to such a necessity: for, *Vim vi repellere licet, modo*

fiat, moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injurium. (1 Inst. 162 a; Wood's Inst., 2nd ed., 359.)

ALCIBIADES. "Who cannot condemn rashness in cold blood?
To kill, I grant, is sin's extremest gust;
But, in defence, by mercy, 'tis most just."
Timon of Athens, Act 3, *Scene* 5.

It is said that it must be a killing upon an inevitable necessity; but necessity always implies that the act was inevitable, or that it could not have been otherwise. The party assaulted is not to be excused, unless he gives back to the wall, hedge, river, &c., beyond which he cannot go, before he kills the other. But if A. assault B. so fiercely and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A., it is *se defendendo*, because it is not done *felleo animo*: for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.* (H. P. C. 41, 42; 3 Inst. 55, 56.) What any one may have done for the protection of his person, is considered to have been done by law.

SCENE I.—*A Churchyard.*

Enter Two Clowns, *with Spades, &c.*

1 CLOWN. "Is she to be buried in christian burial, that wilfully seeks her own salvation?"

2 CLOWN. "I tell thee, she is; therefore make her grave straight: the crowner hath sate on her, and finds it christian burial."

1 CLOWN. "How can that be, unless she drowned herself *in her own defence?*"

2 CLOWN. "Why, 'tis found so."

1 CLOWN. "It must be *se offendendo;* it cannot be else. For here lies the point: If I drown myself wittingly, it argues an act: and an act hath three branches; it is, to act, to do, and to perform: Argal, she drowned herself wittingly."

2 CLOWN. "Nay, but hear you, goodman delver."

1 CLOWN. "Give me leave. Here lies the water; good: here stands the man; good: If the man go to this water, and drown himself, it is, will he, nill he, he goes; mark you that: but if the water come to him, and drown him, he does not drown himself: Argal, he, that is not guilty of his own death, shortens not his own life."

2 CLOWN. "But is this law?"

1 CLOWN. "Ay, marry is't; crowner's-quest law."—*Hamlet, Act 5.*

It seems that Shakespeare has made the First Clown confound a *felo de se*, or one who is guilty of self-murder, with a person who commits homicide *se defendendo*, in his own defence, or, as he miscalls it, *se offendendo;* for, in answer to the Second Clown's assurance that "the crowner hath sate on her, and finds it christian burial," he says, "How can that be unless

she drowned herself in *her own defence?*" This is also apparent from his reasoning, which, although it may appear absurd, is good law; for he evidently means, that if the water comes to a man and drowns him, not "wittingly," but against his inclination, he is as innocent of suicide as that man is innocent of murder who, *se defendendo*, in his own defence, kills another who *felleo animo* presses upon him. And so the crowner found it "christian burial;" for although the "churlish priest" tells Laertes that "her death was doubtful," yet the Queen says,

> "There on the pendent boughs her coronet weeds
> Clambering to hang, an envious sliver broke;
> When down her weedy trophies, and herself,
> Fell in the weeping brook."

And although, according to this account, the water cannot be said to come to Ophelia, it appears that she was drowned, not "wittingly," but against her inclination. Suicides were not entitled to what is called "christian burial," for it was formerly the custom to drive a stake through the body of one who had been guilty of self-murder, and to bury it in the highway; but this brutal law and ignominious burial has been altered by the 4 Geo. IV. c. 52, which directs that a person *felo de se* shall be buried without any stake driven through the body, privately, in a churchyard, within twenty-four hours from the finding of the inquisition, and between the hours of

nine and twelve at night; but this statute does not authorise the performance of the rites of christian burial.

The evidence of Shakespeare's legal knowledge hereinbefore contained, is in addition to that which I, some time since, submitted to the consideration of the public; and the reader may consider that many, if not all, of the passages I have selected, contain most unmistakable allusions to the maxims of the English law.

THE END.

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